ORIGINAL

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	:	
PHYSICAL PHONORECORD RATE ADJUSTMENT PROCEEDING	:	Docket No. _____
	:	
In the Matter of	:	
DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING	:	Docket No. 96-4 CARP DPRA
	:	

JOINT PETITION FOR ADJUSTMENT OF PHYSICAL PHONORECORD AND DIGITAL PHONORECORD DELIVERY ROYALTY RATES

SUBMITTED BY
NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.,
THE SONGWRITERS GUILD OF AMERICA AND
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

This petition for adjustment of physical phonorecord and digital phonorecord delivery royalty rates is submitted jointly pursuant to 17 U.S.C. §§ 115(c) and 803(a) and 37 C.F.R. § 251.63(b) by the National Music Publishers' Association, Inc., The Songwriters Guild of America (together, the "Copyright Owners") and the Recording Industry Association of America, Inc. (the "Copyright Users").

The Copyright Owners and Copyright Users have held discussions for the purpose of arriving at a joint proposal respecting the physical phonorecord royalty and digital phonorecord delivery royalty rates to commence on January 1, 1998, as authorized under sections 115(c) and 803(a) of the Copyright Act. As a result of

these discussions, the Copyright Owners and Copyright Users are pleased to submit the accompanying Proposal Concerning 1997 Physical Phonorecord and Digital Phonorecord Delivery Royalty Rate Adjustments ("Proposal") and hereby petition the Copyright Office, pursuant to 17 U.S.C. § 803(a) and 37 C.F.R. § 251.63(b), to undertake a notice and comment proceeding to promulgate regulations effecting an adjustment of the royalty rates in the manner set forth in the Proposal. So that the new rates may go into effect as of January 1, 1998, the Copyright Owners and Copyright Users suggest a notice and comment period for the proposed regulations of thirty days.

The Copyright Owners and Copyright Users have a "significant interest" in the royalty rates to be adjusted within the meaning of section 803(a)(1) of the Copyright Act. National Music Publishers' Association, Inc. ("NMPA") is an association of over 600 commercially active American music publishers, whose interests NMPA represents through a variety of legislative, legal, and public relations initiatives. NMPA's wholly owned subsidiary, The Harry Fox Agency, Inc., acts as a licensing agent for over 17,000 music publishers.

The Songwriters Guild of America ("SGA") is a national organization of over 4,500 songwriters. Its primary functions are to promote the interests of authors and composers in their dealings with those who market and use their creative works, and in legislative matters. Like NMPA, SGA represents the interests of those who receive royalties for the use of copyrighted musical works.

The Recording Industry Association of America, Inc. ("RIAA") is an association of approximately 350 recording companies. Its members are the leading

manufacturers of the compact discs, tapes and records sold in the United States, and are engaged in the distribution of music through digital phonorecord delivery systems. RIAA thus represents the interests of those who must pay royalties for use of copyrighted musical works in physical phonorecords and digital phonorecord deliveries.

NMPA, SGA and RIAA were the principal participants representing the interests of copyright owners and users in the 1980 and 1987 mechanical rate adjustment proceeding and, as described above, continue to represent those interests in the current proceeding.

The accompanying Proposal is submitted on the understanding that its various provisions are not severable, and the Copyright Owners and Copyright Users request that both the physical phonorecord and digital phonorecord delivery elements of the Proposal be considered through a consolidated notice and comment proceeding. The Proposal is without prejudice to any position, contention or argument which the Copyright Owners or Copyright Users may take in any proceeding or litigation, and is not intended to be, and should not constitute, a precedent in any future rate adjustment proceeding.

Dated: November 4, 1997

Respectfully submitted,

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PROPOSAL CONCERNING 1997 PHYSICAL PHONORECORD AND DIGITAL PHONORECORD DELIVERY ROYALTY RATE ADJUSTMENTS

Amendments to 37 C.F.R. Part 255

1. Section 255.3 is revised by adding the following new paragraphs:

(i) For every phonorecord made and distributed on or after January 1, 1998, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 7.1 cents, or 1.35 cents per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (j) through (m) of this section.

(j) For every phonorecord made and distributed on or after January 1, 2000, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 7.55 cents, or 1.45 cents per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (k) through (m) of this section.

(k) For every phonorecord made and distributed on or after January 1, 2002, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 8.0 cents, or 1.55 cents per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (l) and (m) of this section.

(l) For every phonorecord made and distributed on or after January 1, 2004, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 8.5 cents, or 1.65 cents per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraph (m) of this section.

(m) For every phonorecord made and distributed on or after January 1, 2006, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 9.1 cents, or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

2. The following conforming revisions are made to Section 255.3:

(a) In paragraph (a), the phrase "paragraphs (b), (c), (d), (e), (f), (g), and (h)" is replaced with the phrase "paragraphs (b) through (m)".

(b) In paragraph (b), the phrase "paragraphs (c), (d), (e), (f), (g), and (h)" is replaced with the phrase "paragraphs (c) through (m)".

(c) In paragraph (c), the phrase "paragraphs (d), (e), (f), (g), and (h)" is replaced with the phrase "paragraphs (d) through (m)".

(d) In paragraph (d), the phrase "paragraphs (e), (f), (g), and (h)" is replaced with the phrase "paragraphs (e) through (m)".

(e) In paragraph (e), the phrase "paragraphs (f), (g), and (h)" is replaced with the phrase "paragraphs (f) through (m)".

(f) In paragraph (f), the phrase "paragraphs (g), and (h)" is replaced with the phrase "paragraphs (g) through (m)".

(g) In paragraph (g), the phrase "paragraph (h)" is replaced with the phrase "paragraphs (h) through (m)".

(h) In paragraph (h), the phrase ", subject to further adjustment pursuant to paragraphs (i) through (m) of this section" is added to the end between the word "larger" and the final period.

3. The title of Section 255.5 is revised to read "Royalty rate for digital phonorecord deliveries in general." and the present paragraph of Section 255.5 is designated as paragraph (a).

4. Section 255.5 is revised by adding the following new paragraph:

(b) Except as provided in section 255.6, for every digital phonorecord delivery made on or after January 1, 1998, the royalty rate payable with respect to each work embodied in the phonorecord shall be the royalty rate prescribed in section 255.3 for the making and distribution of a phonorecord made and distributed on the date of the digital phonorecord delivery (the "Physical Rate"). In any future proceeding under 17 U.S.C. § 115(c)(3)(C) or (D), the royalty rates payable for a compulsory license for digital phonorecord deliveries in general shall be established de novo, and no precedential effect shall be given to the royalty rate payable under this paragraph for any period prior to the period as to which the royalty rates are to be established in such future proceeding.

5. A new section 255.6 is added, which reads as follows:

§ 255.6 Royalty rate for incidental digital phonorecord deliveries.

(a) Except as provided in paragraphs (b) and (c), for every digital phonorecord delivery made on or after January 1, 1998 where the reproduction or distribution of the phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery (an "Incidental DPD"), the royalty

rate payable with respect to each work embodied in the phonorecord shall be the Physical Rate. In any future proceeding under 17 U.S.C. § 115(c)(3)(C) or (D), the characterization of a digital phonorecord delivery as "incidental" and the royalty rates payable for a compulsory license for Incidental DPDs shall be established de novo, and no precedential effect shall be given to the characterization of a digital phonorecord delivery as "incidental" under this section or to the royalty rate payable under this section for any period prior to the period as to which the characterization of a digital phonorecord delivery as "incidental" or the royalty rates are to be established in such future proceeding.

(b) No royalty shall be payable for any "Transient Phonorecord" made in the course of any digital phonorecord delivery made on or after January 1, 1998; provided that a royalty shall be payable with respect to each work embodied in the phonorecord ultimately reproduced by or for the ultimate transmission recipient of such digital phonorecord delivery at the royalty rate prescribed under section 255.5 or the other paragraphs of this section 255.6, as applicable. Nothing in this paragraph shall limit or impair any rights or remedies of the copyright owner of a work against any person who makes reproductions from a Transient Phonorecord for any purpose other than to facilitate the transmission to the ultimate transmission recipient. For the purpose of this paragraph, a "Transient Phonorecord" is a transient phonorecord reproduced in temporary computer memory or digital storage intermediate to the communications system through which a digital phonorecord delivery is made, where such transient phonorecord is made in the ordinary operation of such system solely to facilitate the transmission to the ultimate transmission recipient. An example of a Transient Phonorecord is a phonorecord reproduced temporarily in a router intermediate to the Internet.

(c) (1) For every digital phonorecord delivery made on or after January 1, 1998, no royalty shall be payable where (i) the reproduction or distribution of the phonorecord is incidental to the promotion of a sound recording embodying a work, (ii) the phonorecord is of no more than 30 seconds of playing time of the sound recording of such work, or in the case of sound recordings of a work with a playing time of more than 5 minutes, the phonorecord is of no more than the lesser of 10% or 60 seconds of playing time of the sound recording of such work, and (iii) the digital phonorecord delivery is made or authorized by the copyright owner of such sound recording.

(2) The copyright owner of any work embodied in a sound recording may, without payment of any royalty to the copyright owner of the sound recording, make or authorize a digital phonorecord delivery where (i) the reproduction or distribution of the phonorecord is incidental to the promotion of the work embodied in the sound recording; (ii) the phonorecord

is of no more than 30 seconds of playing time of the sound recording of such work, or in the case of sound recordings of a work with a playing time of more than 5 minutes, the phonorecord is of no more than the lesser of 10% or 60 seconds of playing time of the sound recording of such work, and (iii) the digital phonorecord delivery is made by the copyright owner of such work, either individually or collectively with other copyright owners of such works, or by an organization of copyright owners designated by such copyright owners as their common agent.

6. A new section 255.7 is added, which reads as follows:

§ 255.7 Future proceedings.

The procedures specified in 17 U.S.C. § 115(c)(3)(C) shall be repeated in 1998 and every second year thereafter until 2006 so as to determine the applicable rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2000, 2002, 2004, 2006 and 2008. The procedures specified in 17 U.S.C. § 115(c)(3)(D) shall be repeated, in the absence of license agreements negotiated under 17 U.S.C. § 115(c)(3)(B) and (C), upon the filing of a petition in accordance with 17 U.S.C. § 803(a)(1), in 1999 and every second year thereafter until 2007 so as to determine new rates and terms for the making of digital phonorecord deliveries during the periods beginning January 1, 2000, 2002, 2004, 2006 and 2008. Thereafter, the procedures specified in 17 U.S.C. § 115(c)(3)(C) and (D) shall be repeated in each fifth calendar year. Notwithstanding the foregoing, different years for the repeating of such proceedings may be determined in accordance with 17 U.S.C. § 115(c)(3)(C) and (D).

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long-distance data transmission.

Tauzin also plans to pursue House passage of a Senate bill that would force the FCC to abide time limits on merger reviews and eschew imposing conditions for approval. The FCC is now charged with determining whether a deal is in "the public interest"—a flexible standard that has drawn the ire of merging companies and the new FCC chairman.

"They regulate you specifically, subjectively by forcing you to adopt so-called voluntary conditions and delaying your approval until you agree," Tauzin said. "It's a form of government blackmail."

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Proponents of gradual telecommunications deregulation say the telecom act has encouraged investors to support a new crop of telecommunications rivals by creating a climate in which they can compete against Bell companies. Change that climate, they argue, and already-jittery investors will tighten their purse strings further, threatening a host of start-ups with extinction.

"If Billy really did what he's talking about, he'd punch a hole in the already declining information sector," said Reed Hundt, a former FCC chairman who clashed mightily with Tauzin. "He might even be able to take as much as a percentage point off the gross domestic product."

Tauzin's desire to roll back the powers of the FCC does not mean he opposes all new regulation. He threatened to impose rules on the cable television industry if its rates continue to rise. He said the industry must halt the trend toward entering into exclusive contracts with sports franchises that force consumers to buy fat packages of services to watch their favorite teams—an issue that threatens to provoke public anger.

"My message to the industry is 'Don't let it happen,'" Tauzin said. "I don't want to have to deal with it."

He said he would focus on accelerating the stalled transition to high-definition television—a digital form of broadcasting that delivers dramatic improvements in picture quality. Congress handed television stations additional rights to the airwaves to begin the new services four years ago, but the extra channels have mostly gone unused.

Broadcasters say they have little incentive to roll out the service until enough households own digital televisions. The set makers say they have little incentive to manufacture such televisions until the broadcasters provide programming. Tauzin plans to use his gavel to break the logjam.

Federal authorities are under great pressure to speed this transition: The FCC plans to auction off the airwaves now being used